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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD PASQUAL,

Defendant and Appellant.

B211394

(Los Angeles County
Super. Ct. No. BA290975)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Sam Ohta, Judge. Reversed with directions.

William S. Pitman for Defendant and Appellant

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth C. Byrne
and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a plea bargain, the court sentenced 19-year-old Richard Pasqual to 39 years in prison based on his plea of no contest to one count of attempted murder and his admissions he committed the crime for the benefit of a street gang and personally and intentionally discharged a firearm in doing so. The court denied Pasqual's presentence motion to withdraw his plea in spite of undisputed testimony from a clinical psychologist that Pasqual is "mentally deficient," that his greatest cognitive weakness lies in comprehending abstract notions of time—the most significant aspect of his plea—and despite evidence that the only witness to identify Pasqual as the shooter subsequently, under oath, identified a different person. After obtaining a Certificate of Probable Cause, Pasqual brought this appeal from his conviction contending that the trial court erred in denying his motion to withdraw his plea.¹ We reverse. Substantial evidence does not support the trial court's ruling.

FACTS AND PROCEEDINGS BELOW

We summarize the evidence from Pasqual's preliminary hearing.

James Lee and Sue Cho left a restaurant at approximately 4:00 a.m. As they stood on the street talking, a gray van pulled up along side them and two Hispanic men jumped out. One of the men placed a gun against James' head and demanded, "'Give me all your stuff.'" ² The man then asked James, "'Where you from? . . . You from Asian Boys?' ³ Fuck Asian Boys,'" the man said. While this man held James at gunpoint the other man took James' wallet and cell phone and Sue's bracelet and cell phone. Someone inside the van yelled, "'Let's go,'" and the two robbers returned to the van. Before getting into the van, the man with the gun said to James: "'Hey, you want to die? I'm going to kill you,

¹ A plea of no-contest is treated the same as a plea of guilty for purposes of a motion to withdraw the plea. (Pen. Code, §§ 1016, par. 3, 1018.) For convenience we will refer to Pasqual's plea as a plea of guilty.

² Because the third victim also has the last name Cho, we will refer to all three victims by their first names.

³ The Asian Boys is a Los Angeles gang.

you little Asian Boy. Fuck Asian Boys.’” As the van drove away someone inside fired a single shot in the direction of James and Sue. The bullet struck a third person on the street, Ben Cho. James and Sue identified Pasqual as the man who held the gun on James. They testified that they did not see who fired the shot from the van.

Ben left the restaurant a few minutes after James and Sue. As he began walking up the street he saw a Hispanic man holding a gun on James while another Hispanic man searched through James’ pockets. He then saw the two men get into a van. As the van drove past Ben with its sliding door open one of the passengers fired a shot that struck Ben in the thigh. Ben identified Pasqual as the man who held the gun on James and fired the shot from the van.

The prosecution’s gang expert testified that Pasqual was a member of the 38th Street Gang and that in his opinion the crimes committed against James, Sue and Ben were committed to benefit the gang. According to the expert, the gang benefited because the use of a gun created fear and enhanced the gang’s reputation for violence within the community. The expert also testified that non-Asian gangs in Southern California consider themselves to have a “green light” to do “whatever they want” to members of the Asian Boys.

The information charged Pasqual with two counts of second degree robbery, three counts of assault with a firearm and three counts of attempted premeditated murder. Each count alleged personal firearm and gang enhancements.

The prosecution and the defense engaged in settlement negotiations for the first time on the day set for trial. While waiting for the jury venire to arrive from their assembly room, the court inquired as to the status of settlement discussions. Pasqual’s privately retained attorney stated that Pasqual would be willing to enter a guilty plea in return for a sentence of 9 years. The prosecution rejected that offer but stated it would consider an offer of a determinate sentence in the range of “30 years plus.” The court told Pasqual that if convicted on all the charges against him he could receive multiple

consecutive life sentences but that the prosecution had indicated a willingness to settle for a determinate term so “you don’t have to be in prison for the rest of your life.”

After the prosecution offered “30 years plus,” Pasqual and his attorney conferred in the lockup. (The record does not show how long this conference lasted.) When they returned to the courtroom a discussion took place off the record. The court then went on the record to describe the settlement that had been reached. Pasqual’s attorney stated that his client would accept a determinate term of 29 years. The prosecution countered with 39 years and Pasqual accepted the 39-year offer. Under the agreement the court would strike the allegation of premeditation from one of the attempted murder counts and Pasqual would plead guilty to that count. Pasqual would also admit the gang allegation and the allegation of personal discharge of a firearm. The 39-year sentence would consist of the high term of 9 years for attempted murder plus a consecutive 20 years for the personal use enhancement plus a consecutive 10 years for the gang enhancement.

After Pasqual’s counsel informed the court that his client would accept a 39-year sentence the court and Pasqual had the following dialogue:

“The Court: [You are] willing to accept the 39, is that correct sir?

“The Defendant: Yes, your Honor.

“The Court: Do you have any questions about any of the things that we have discussed about the offer?

“The Defendant: No, your Honor.

“The Court: Do you understand the offer?

“The Defendant: Yes. [¶] . . . [¶]

“The Court: All right. Now, Mr. Pasqual, you only have to enter a plea on one of these counts, on one of the eight counts. It’s going to be count 6, the attempted murder count. On that count the offer is that you would plead to that count as an attempted murder count without the willful, premeditation; that you would also admit that this crime was committed in association with and . . . for the benefit of . . . [¶] [and at] the direction of, with the specific intent to promote, further or assist the criminal street gang.

You're going to have to admit that. You will receive ten years for that admission. You're also going to have to admit the personal and intentional discharge of a firearm pursuant to Penal Code section 12022.53, subdivision (c), which adds 20 years, and then you will receive a term of 39 years determinate on this case. Do you understand the offer?

"The Defendant: Yes, your Honor.

"The Court: All right. The information as it is alleged right now has five indeterminate terms. That's count 1, 2, 6, 7 and 8. It's the maximum you are looking at. You're looking at five indeterminate terms. [¶] Do you understand the maximum sentence.?

"The Defendant: Yes, your Honor.

"The Court: Now, before I can accept your plea, have you had an opportunity to talk about the case with your attorney and [discuss] any and all defenses that you might have in this matter?

"The Defendant: Yes."

The court then advised Pasqual of the constitutional rights he was giving up by pleading guilty. After the explanation of each right the court asked Pasqual if he understood the right and whether he was willing to give it up. Pasqual answered "Yes" to each question. He also answered "Yes" when asked: "Are you entering into this plea freely and voluntarily because you think it is in your best interest to do so?" Finally, Pasqual answered "No" to the questions whether anyone made any other promises to him or threatened him to make him plead guilty.

Pasqual's attorney stipulated that there was a factual basis for the plea based on the police report. The court accepted the plea and continued the matter for sentencing.

While the sentencing hearing was pending, Pasqual's trial attorney died and Pasqual retained a new attorney. The new attorney filed a motion to withdraw Pasqual's plea on the grounds that Pasqual received ineffective assistance from his counsel in the plea bargain and that he did not understand the nature and consequences of his plea.

The new attorney testified in support of the motion that when he received Pasqual's file from the office of his former counsel it contained nothing but the complaint and the police reports. "There was no information in the file, there was no preliminary hearing transcript in the file, there were no handwritten notes of any kind. There were no memos with respect to investigation or anything of that nature. Essentially all I received was just a copy of the complaint and the police reports and there were no markings on it of any kind, nothing highlighted."

In further support of the motion, Pasqual submitted a declaration in which he testified: "I . . . did not understand how much time I would be serving in prison as a result of the plea" and that had he understood the length of the prison term he would have to serve he would not have accepted the deal. According to Pasqual, when he went back to the lockup with his attorney to discuss the plea bargain: "I felt pressured and rushed and did not have a chance to think about what was being offered. My lawyer told me that I had to decide immediately and he had earlier told me I would get nine years." "I . . . did not understand what I was getting into." "If I had a better understanding of the plea agreement . . . I would not have plead [sic] guilty." "I was confused and scared when I entered my guilty plea and felt that I had no choice but to plead guilty."

Pasqual submitted a report by a forensic psychologist to support his claim that he did not understand and intelligently enter his guilty plea. The psychologist also testified at the hearing on the motion. We discuss this report and testimony in more detail below. In summary, the psychologist stated that after reviewing Pasqual's school records, interviewing Pasqual and evaluating the tests he administered to Pasqual, he formed the opinion that Pasqual lacked the mental capacity to understand what he was admitting to at the plea bargain and the consequences of those admissions in terms of the length of time he would be in prison unless those admissions and consequences had been slowly and carefully explained to him. In particular, Pasqual could not grasp the concept of 39 years without being given concrete explanations and examples. The psychologist conceded he

did not have personal knowledge whether Pasqual received the necessary explanations before he entered his plea.

Prior to the hearing on Pasqual's motion, Ben testified at the trial of the man who allegedly got out of the van with Pasqual and joined him in taking property from James and Sue. At this trial Ben changed his testimony and stated that this man, not Pasqual, was the person who pointed the gun at James during the robbery and was the one who shot Ben from the van. Pasqual filed a supplemental motion to withdraw his plea asking the court to take judicial notice of Ben's exculpatory testimony at the accomplice's trial which he attached as an exhibit to the motion. At the hearing on Pasqual's motion, the prosecutor offered to accept a sentence of 29 years (substituting a 10-year enhancement for personal use of a firearm for the 20-year enhancement for personal discharge of a firearm). Pasqual rejected the prosecutor's offer.

The trial court denied Pasqual's motion to withdraw his plea. It found that Pasqual had failed to establish grounds to set aside his plea by clear and convincing evidence.

On the issue of whether Pasqual was aware of the consequences of his plea, the court stated that it "is in the best position to assess what happened. . . . I was there. I took the plea. I looked at the defendant in the eye and read his body language in taking the plea."

The court also ruled Pasqual was not entitled to withdraw his plea based on the change in Ben's testimony identifying a different person as the one who used the gun in the robbery because that change in testimony occurred after Pasqual entered his plea and therefore had no bearing on his decision to accept the prosecution's 39-year offer.

The court imposed the sentence called for in the plea bargain consisting of 9 years for the attempted murder (Pen. Code, §§ 187, 664, subd. (a)); a consecutive 20 years for personally and intentionally discharging a firearm in the commission of that crime (Pen. Code, § 12022.53, subd. (c)) and 10 consecutive years for the gang enhancement (Pen. Code, § 186.22, subd. (b)(1)(C)).

DISCUSSION

“On application of the defendant at any time before judgment . . . , the court may . . . for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and promote justice.” (Pen. Code, § 1018.) Our Supreme Court has held that a motion to withdraw a plea of guilty must be decided “in the interest of promoting justice.” (*People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 796–797.)

To be valid, a defendant’s plea bargain must be made knowingly and intelligently. (*People v. Thomas* (1986) 41 Cal.3d 837, 844–845.) This means that the defendant must enter the agreement voluntarily and with an understanding of the charges and the direct consequences of the plea including the sentence. (*Bradshaw v. Stumpf* (2005) 545 U.S. 175, 183; *People v. Panizzon* (1996) 13 Cal.4th 68, 80.)

Here, the trial court informed Pasqual of the sentence he could receive if found guilty on all counts versus the sentence he would receive by pleading guilty to attempted murder and admitting the gun and gang enhancements, recited to him the constitutional rights he was waiving and asked him if he understood the plea bargain and the rights he was giving up. Pasqual indicated he understood the court’s explanations, responding “Yes” 26 times and “No” 3 times. Considering the whole record, however, these 29 monosyllabic answers do not constitute substantial evidence that Pasqual “understood what he was getting into.”

Dr. Jeffrey Whiting, a clinical psychologist with 25 years experience testified for the defense and submitted a report at the hearing on the motion to withdraw the plea.

In the report, Whiting stated that based on his interview and testing he concluded Pasqual is “in the high end of the mildly mentally deficient range (mild mental retardation).” On a three-part intelligence test, in which 100 is the average score, Pasqual scored between 66 and 69 which put him in the bottom one to two percent of those who have taken the test.

Whiting further stated that with respect to the plea bargain the significance of Pasqual's low intelligence lies in his inability "to utilize abstract thinking." That is, "he is prone to see what is in front of him, what he can feel and touch, but struggles with concepts that pertain to a future that has no markers for him to understand, or a concept that [he] does not have a current, perceivable means of defining." Thus, Pasqual is able to understand the concept of time, "but only in short increments. Anything beyond a week or month into the future would be a concept that would require the ability to be abstract, which is impossible for him. . . . [I]n order for him to imagine what 30 of something would amount to, one would need to present 30 of these objects. A person with normal intelligence would be able to look at one object and be able to imagine the size and grasp the meaning of 30 of these objects, without seeing the 30 objects."

Turning to Pasqual's answers to the court's questions, Whiting explained that in order to appear normal, persons with Pasqual's low intelligence try to fool others around them into believing that they understand more than what they actually do. "[O]ften they will head nod in agreement, and utter the equivalent of 'yes' as a means of displaying understanding and agreement, when the individual actually comprehends little to nothing."

Whiting's report concluded that given Pasqual's "intellectual deficits" there was nothing in the record to show "that he knew what he was agreeing to."

At the hearing, Whiting testified that when dealing with a person, such as Pasqual, who is "in the low borderline mentally deficient area," "great care must be taken . . . because they do not understand and appreciate future consequences, future resultants [sic] of things that are abstract. The only way that one can insure that they actually understand what future ramifications there might be is to approach it with two strategies." The first strategy is to "use concrete evidence, concrete factors so as to make sure that the individual understands what is represented so it becomes concrete as opposed to abstract." The second strategy is to make sure "that time is taken to slow the process

down so that [the person] could fully appreciate and the people around him can be fully confident that the individual is understanding what it is that he is agreeing to.”

Whiting conceded that he was not present during the plea negotiations and therefore could not express an opinion “as to whether Mr. Pasqual understood the questions or was able to understand what was being said to him.” It was Whiting’s opinion, however, based on the factors discussed in his report, that “we don’t know, even though he answered the questions, whether he actually appreciated the ramifications of those answers.” Whiting concluded his direct testimony with the following colloquy.

“[Whiting]: So this is a seriously deficient individual in terms of his ability to use what is the most important factor when he enters a plea, I believe, which is abstraction, his ability to abstract, his ability to think ‘I’m agreeing to this, and this is what this really means.’ It is something I’m saying in the present but it has future consequences and that requires abstract thinking.

“[Counsel]: And you believe that Mr. Pasqual is deficient in engaging in abstract thinking of that nature?

“[Whiting]: That I am sure of.”

The prosecution did not challenge Whiting’s opinions regarding Pasqual’s low intelligence, the unreliability of his answers to the court’s questions or his need to have abstract concepts of time explained slowly and carefully. Nor did it present any rebuttal evidence. Thus, the undisputed psychological testimony reveals that if Pasqual was to knowingly and intelligently accept a sentence of 39 years he would have had to have a slow, methodical, concrete explanation of what he was agreeing to.

The responsibility for making sure that Pasqual understood the plea bargain lay with his attorney. As noted in the commentary to the American Bar Association’s Standards for Criminal Justice: “[T]he court must inquire into the defendant’s understanding of the possible consequences at the time the plea is received . . . [but] this inquiry is not, of course, any substitute for advice by counsel. The court’s warning comes just before the plea is taken, and may not afford time for mature reflection.”

(ABA Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999) Std. 14-3.2, com., p. 118.)

There is no evidence that Pasqual received the necessary explanation of his sentence from his attorney. Indeed, all the evidence points to the contrary.

Pasqual testified that the only time he even met with his trial attorney was in the lockup before his court appearances. The record contains no evidence that at the time Pasqual pleaded guilty his attorney had discussed the case with him and that the attorney believed Pasqual understood the plea bargain including the sentence. (Cf. *Bradshaw v. Stumpf*, *supra*, 545 U.S. at p. 183 [“[T]he constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel.”].)

Pasqual states in his declaration: “Before I plead [*sic*] guilty, I had spent almost no time with my lawyer . . . [¶] I did not understand the possible defenses in this case or my constitutional rights and did not understand how much time I would be serving in prison as a result of the plea. . . . [¶] I was confused and scared when I entered my guilty plea and felt that I had no choice but to plead guilty. I felt pressured and rushed and did not have a chance to think about what was being offered. My lawyer told me I had to decide immediately and he had earlier told me I would get nine years. If I had a better understanding of the plea agreement on June 6, 2006, I would not have plead guilty.”

Pasqual’s new attorney testified: “When I met with the defendant, he did not appear to understand that he would be spending over 33 years in prison as a result of his plea.” The attorney’s observation is consistent with Dr. Whiting’s report of his interview with Pasqual. Whiting noted that when he asked Pasqual “if he was aware of the length of the prison sentence that he agreed to serve in his plea agreement, he [replied] that he did not know the answer.”

The previous attorney’s apparent lack of trial preparation (see discussion at page 6, above) and the hurried nature of the events leading up to the plea bargain also raise doubt that the attorney adequately explained the plea agreement to Pasqual.

In the end, the trial court rejected Pasqual's claim that he did not understand his plea agreement based on his eye contact and body language in answering the court's "do you understand" questions. Every trial judge, of course, grasps the value of assessing a witness's truthfulness by the manner in which testimony is presented; inflections of the voice, eye contact, body language and a variety of other mannerisms.⁴ In this case, however, the undisputed evidence showed that Pasqual's eye contact and body language were *not* trustworthy indicators that he understood the terms of his plea bargain, especially the length of his sentence. Dr. Whiting explained that a person with Pasqual's intelligence deficit becomes adept at picking up cues to assist him in knowing what to say. Such a person will nod their head in agreement and say "'yes' as a means of displaying understanding and agreement, when the individual actually comprehends little or nothing."⁵

We conclude that the record does not contain sufficient evidence to establish a voluntary and intelligent plea by Pasqual who is undisputedly shown to possess cognitive difficulties that relate directly to his ability to understand the most significant aspect of his plea—the length of his prison term.

Allowing Pasqual to withdraw his plea does not defeat the People's interest in the finality of judgments. Pasqual filed his motion to withdraw his plea before the court pronounced sentence. The People do not claim they would suffer any actual prejudice from the withdrawal of the plea.

⁴ Evidence Code 780, subdivision (a) provides that in determining the credibility of a witness the trier of fact may consider "[h]is demeanor while testifying and the manner in which he testifies."

⁵ This is not to say that the court must always accept an expert's psychological opinion, but it cannot reject that opinion arbitrarily. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1568.) The dismissal of a critical opinion in a psychologist's report with no explanation or reason apparent from the record is arbitrary and an abuse of discretion.

DISPOSITION

The judgment is reversed and the cause is remanded to the trial court with directions to grant defendant's motion to withdraw his plea and to proceed in accordance with law.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.